

Restitution in Federal Criminal Cases

Sentencing Institute

September 2000, Phoenix, Arizona

by

Catharine M. Goodwin, Assistant General Counsel

Administrative Office, U.S. Courts

Table of Contents

A. History of Federal Restitution Law	3
B. 5-Steps in Determining Restitution	4
Step 1: Identify the offense of conviction	5
Step 2: Identify victims	6
Step 3: Identify victims' harms caused by the offense	7
Step 4: Determine which harms (and/or costs) are statutorily compensable as restitution	8
Step 5: Determine if plea agreement broadens restitution	9
C. Restitution Compared to Relevant Conduct	10
D. Recent Issues in Restitution	11-14
E. Restitution Articles (Attached)	15
1. <i>"The MVRA and Other Bases of Expansion of Restitution, Or: 'Waiter, What's a Tort Doing in my (Sentencing) Soup!'",</i> Goodwin, unpublished. (pp 1-11)	
2. <i>"The Imposition of Restitution in Federal Criminal Cases,"</i> Goodwin, <u>Federal Probation</u> , vol. 62, No. 2, December 1998, pp. 95-108.	
3. <i>"Imposition and Enforcement of Restitution,"</i> Goodwin, <u>Federal Probation</u> , vol. 64, No. 1, June 2000, pp. 62-72.	
4. <i>"The Perplexing Problem with Criminal Monetary Penalties in Federal Courts,"</i> Judge R. Furgeson, Goodwin, and Zucker, <u>Review of Litigation</u> , Vol. 19, No. 2, spring 2000, pp. 167-191.	

A. History of Federal Restitution Law

- 1925 Federal Probation Act (FPA)** - Restitution imposable only as condition of supervision
- 1982 Victim Witness Protection Act (VWPA)** - 18 U.S.C. §§ 3579, 3580
Restitution as a separate component of sentence
Discretionary restitution - court must balance harm with defendant's ability to pay
- 1984 Sentencing Reform Act** - Recodified VWPA at §§ 3663 and 3664; reaffirmed restitution as one of several, separate components of a sentence.
- 1990 *Hughey v. U.S.*** - S. Ct. allows restitution only for harm caused by offense of conviction

Post-Hughey Amendments to VWPA:

- 1) restitution for scheme, pattern, conspiracy - if element of offense (§ 3663(a))
- 2) parties can agree to restitution to any extent, in any case (§ 3663(a)(3))
- 3) parties can agree to restitution to other than victims of offense (§ 3663(a)(1)(A))

- 1992 Mandatory restitution for Child Support Recovery Act (CSRA)** - 18 U.S.C. § 228
- 1994 Mandatory restitution for certain title 18 offenses, such as violence against women, exploitation of children, and telemarketing:**
§ 2248 (for §§ 2241-2245, sexual abuse)
§ 2259 (for §§ 2251-2258, sexual exploitation of children)
§ 2264 (for §§ 2261-2262, domestic violence)
§ 2327 (for §§ 1028-1029 and §§ 1341-1345, telemarketing)

Amendment to VWPA:

Restitution for victims' lost income, transportation, child care, and other expenses related to participation in investigation and prosecution of case - § 3663(b)(4).

- 1996 Mandatory Victims Restitution Act (MVRA)** - amended §§ 3663 and 3664; amended debt collection statutes (§ 3611 et. seq. and § 3571 et. seq.); created § 3664A (mandatory restitution for most non-drug federal offenses); victims "directly and proximately" harmed by the offense; "full amount of each victim's losses" at § 3664(f)(2); stronger imposition and enforcement procedures.
- 1998 Deadbeat Parents Act of 1998** - changes to CSRA (18 U.S.C. § 228), clarifying mandatory nature of restitution for past due support obligations.

B. 5-Steps in Determining Victims and Harms for Restitution in Federal Criminal Cases

Step One:

Identify the Offense of Conviction (in order to determine:)

- a) whether restitution is mandatory or discretionary**
- b) whether restitution can be imposed as separate sentence or only as a condition of supervision**
- c) what the scope of the offense is, for steps 2 and 3.**

Step Two:

Identify the Victims of the Offense of Conviction.

Step Three:

Identify Victims' Harms Caused by the Offense of Conviction.

Step Four:

Determine Which Harms (and/or costs) are Statutorily Compensable as Restitution.

Step Five:

Determine if the Plea Agreement Broadens Restitution.

Step 1: Identify the Offense of Conviction

In Order to:

- A. Determine Whether Restitution is Mandatory or Discretionary for the Offense***
- B. Determine Whether Restitution is Authorized as a Separate Sentence or Only as a Condition of Supervision***
- C. Determine the Scope of the Offense of Conviction for Applying Steps 2 and 3 (Determining victims and harms)***

Step 2: Identify Victims of the Offense of Conviction

Under Federal Restitution Statutes: Restitution Victims Must be Victims Harmed by Conduct of the Offense of Conviction

Statutory definitions of restitution victims:

(mandatory or discretionary restitution, generally):

“For purposes of this section, the term ‘victim’ means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered...” § 3663A(a)(2) and § 3663(a)(2).

(mandatory or discretionary restitution involving scheme, etc.):

“...including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, a victim is a person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.” § 3663A(a)(2) and § 3663(a)(2).

(specific title 18 offenses):

“...losses suffered by the victim as a proximate result of the offense.” Title 18 special restitution statutes (§§ 2248, 2259, 2264, and 2327).

Step 3: Identify Victims' Harms Caused by the Offense of Conviction

Statutory terms on causation of restitution harms:

- [the victim is] “*a person directly and proximately*” harmed (for §§ 3663A, 3663)
- [restitution authorized for] “*the full amount of the victim’s losses,*” ((§§ 2327, 2248(3), 2259(3) and 2264(3)). That includes “*all losses suffered by the victim as a proximate result of the offense*” (for § 2327(2), (3)), or [in addition to a list of specific harms] “*any other losses suffered by the victim as a proximate result of the offense.*” (for §§ 2248(3), 2259(3) and 2264(3)).
- “*In each order of restitution, the court shall order restitution to each victim in the full amount of each victim’s losses as determined by the court...*” (§ 3664(f)(1))

Step 4: Determine Which Harms (and/or Costs) Are Statutorily Compensable as Restitution

I. Harms authorized for Restitution by 18 U.S.C. §§ 3663A(b) or 3663(b)

In offense resulting in damage to, loss, or destruction of victim's property --

Return of the property, or greater of value of property on date of offense or sentencing, less its value (if any) when returned to victim. §§ 3663A(b)(1); 3663(b)(1).

In offense resulting in bodily injury to a victim --

Cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including non-medical care and treatment and necessary physical and occupational therapy and rehabilitation; and income lost by the victim as a result of the offense. §§ 3663A(b)(2); 3663(b)(2).

In offense resulting in bodily injury and death of a victim --

Pay cost of necessary funeral and related services. §§ 3663A(b)(3); 3663(b)(3).

In each restitution order,

the court shall order restitution for *"the full amount of each victim's losses"* (§ 3664(f)(1))

II. Costs authorized for Restitution by 18 U.S.C. §§ 3663A(b) or 3663(b)

In any case --

Victim's costs for lost income, necessary child care, transportation, and other expenses related to participation in the investigation and prosecution of the offense or attendance at proceedings related to the offense. § 3663A(b)(4); 3663(b)(4).

III. Harms Authorized for Restitution by Special Restitution Statutes:

The defendant shall pay the *"full amount of the victim's losses"* (§§2327, 2248, 2259, and 2264) which includes:

"all losses suffered by the victim as a proximate result of the offense." (18 U.S.C. §§ 2327(2),(3), telemarketing); or

specific, inclusive list of harms, e.g., psychiatric or psychological care, transportation, temporary housing, and child care, lost income, attorneys' fees, and any other losses suffered by the victim as a *"proximate result of the offense."* (18 U.S.C. §§ 2248(3), 2259(3), and 2264(3)).

Step 5: Determine if the Plea Agreement Broadens Restitution

I. Statutory provisions that allow more restitution to be imposed than could otherwise be legally imposed, pursuant to steps 1-4:

If the parties agree, pursuant to a plea agreement, the court can order

- a) Restitution in **any** criminal case **to the extent** agreed to by the parties in the plea agreement (§ 3663(a)(3)); [should, by implication, be available for mandatory restitution cases as well];
- b) Restitution to persons **other than the victim of the offense** (§§ 3663A(a)(3) and 3663(a)(1)(A)); and
- c) **Mandatory restitution for non-qualifying offense**, if the parties agree that the plea agreement resulted from a qualifying offense (§ 3663A(c)(2)).

Agreement must be a specific, binding agreement between the parties.

Statutory directive to the government:

The Attorney General shall ensure that, “in all plea agreements . . . consideration is given to requesting that the defendant provide full restitution to all victims of all charges contained in the indictment or information, without regard to the counts to which the defendant actually pleaded.” Commentary notes, § 3551 (added by MVRA).

C. Relevant Conduct and Restitution Compared

I. The Offense of Conviction is Broader for Relevant Conduct Than for Restitution

The purpose of Relevant Conduct is to account for the *culpability* of the defendant and the (potential) *seriousness* of the offense; U.S.S.G. § 1B1.3 defines the “offense” to include:

- acts in preparation of the offense
- acts in avoidance of detection of the offense
- acts in same course of conduct or common scheme or plan as offense.
- includes intended or attempted harms
- includes property that is recovered or returned

Also, gain can sometimes be used instead of loss.

The purpose of restitution is more focused: to *restore* the victim to his or her pre-offense condition; thus, its scope is limited to:

- loss caused by the offense of conviction (including the scheme, pattern, or conspiracy if an element of the offense); does not include acts in preparation, or those in avoidance of detection; gain cannot substitute for the loss.
- loss is further limited to actual, unrecovered loss (and certain costs)

II. Restitution Sometimes Includes Specific Harms (and Costs) not Included in Relevant Conduct

Three examples are:

Restitution can include psychological counseling, medical or physical therapy or treatment; and if death results, restitution is authorized for funeral expenses.

“In any case,” restitution is authorized for the victim’s costs involved in participating in the investigation and prosecution of the case, including transportation, child care, and lost income.

Restitution can sometimes be increased after sentencing, such as when new losses are discovered (§ 3664(d)(5)); or it can include future harms that can be sufficiently ascertained at sentencing (see, e.g., U.S. v. Laney, 189 F.3d 954 (9th Cir. 1999)).

D. Recent Issues in Restitution

1. Causation of Harms (see *Step 3*):

Statutory language: [Victims are persons] “*directly and proximately harmed*” as a result of the commission of an offense. §§ 3663(a)(2) and 3663A(a)(2)

U.S. v. Martin, 195 F.3d 961 (7th Cir. 1999): Court must separate the harm caused by the illegal conduct and that caused by related, unethical, but legal conduct.

U.S. v. Sapoznik, 161 F.3d 117 (7th Cir. 1998): Restitution to the city upheld where court estimated the portion of the police chief’s services that were affected by his illegally accepting bribe (result: one year of four years’ salary).

U.S. v. Menza, 137 F.3d 533 (7th Cir. 1998): Restitution vacated for court to separate routine costs of cleaning any vacated apartment from those costs of the landlord “caused” by the explosion resulting from the defendant’s meth lab.

U.S. v. Brierton, 165 F.3d 1133 (7th Cir. 1999): Acts committed to cover-up the fraud, even though part of the common scheme or plan (and thus relevant conduct) of the offense of conviction, were not part of the offense for restitution purposes.

2. Which Harms are Compensable: Tie to One (or More) Statutory Provision (See *Step 4*):

“in any case, [The court may require the defendant to] reimburse the victim for lost income and necessary child care, transportation and other expenses related to participation in the investigation or prosecution of the offense ...”
18 U.S.C. §§ 3663(b)(4) and 3663A(b)(4)

U.S. v. Malpeso, 126 F.3d 92 (2nd Cir. 1997): Court combines this provision with the third-party compensation provision (§ 3664(j)(1)) to uphold restitution to FBI for costs of relocating victim/witness for cooperation with prosecution of the case.

U.S. v. Hayes, 135 F.3d 133 (2nd Cir. 1998): Court partly relies on this provision to uphold restitution for victim costs incurred obtaining protective order (that defendant later violated), as indication of intent to compensate costs/harms incurred outside of time period of offense conduct.

“[where the offense resulted in bodily injury to a victim, the court may order the defendant to pay] (A) ...the cost of ... nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment; ...(C) reimburse the victim for income lost ... as a result of such offense.” 18 U.S.C. §§ 3663(b)(2) and 3663A(b)(2)

U.S. v. Keith, 754 F.2d 1388, 1393 (9th Cir.), cert denied, 474 U.S. 829 (1985): Restitution upheld for cost of the victim’s air fare to visit her family, as “nonmedical care and treatment” for the victim’s trauma resulting from assault with intent to rape.

U.S. v. Jacobs, 167 F.3d 792 (3rd Cir. 1999): Restitution upheld for value of annual leave used by victim, as “lost income.”

“[Defendant shall pay the] “full amount of the victim’s losses ... as a proximate result of the offense.” 18 U.S.C. §§ 2248, 2259, and 2264.

U.S. v. Crandon, 173 F.3d 122 (3rd Cir. 1999): Basis of restitution upheld under 2259 for in-patient psychiatric care of juvenile victim.

U.S. v. Hayes, 135 F.3d 133 (2nd Cir. 1998): Part-basis of restitution upheld for victim’s legal costs in obtaining protective order prior to defendant’s interstate travel to violate the order.

“In each order of restitution, the court shall order restitution to each victim in the full amount of each victim’s losses as determined by the court...” 18 U.S.C. § 3664(f)(1)(A)

U.S. v. Rea, 169 F.3d 1111 (8th Cir. 1999): Restitution upheld in arson case citing this provision as basis for the order.

3. Procedures Regarding Imposing Restitution

90-day continuance to determine restitution

“If the victim’s losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim’s losses, not to exceed 90 days after sentencing....” 18 U.S.C. § 3664(d)(5)

U.S. v. Grimes, 173 F.3d 634 (7th Cir. 1999): The court “shall” use the 90-day continuance

provision to identify as many victims as possible, where needed.

U.S. v. Stevens, 211 F.3d 1 (2nd Cir. 2000): The 90 days can be tolled by defendant's conduct, and delay beyond that period is not error unless defendant can show prejudice; legislative history of the provision is discussed.

U.S. v. Vandenberg, 201 F.3d 805 (6th Cir. 2000): The court must resolve restitution issues within the 90 days, but no hearing is required, so long as parties have notice and an opportunity to be heard (through pleadings); further delay not error if ultimately cured (parties given full opportunity to be heard).

Harms discovered after sentencing, or “future harms” ascertainable at sentencing

“...[If the victim's losses were not ascertainable by sentencing, the court shall determine them within 90 days after sentencing.] ... If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.” 18 U.S.C. § 3664(d)(5)

U.S. v. Laney, 189 F.3d 954 (9th Cir. 1999). The court can order restitution for future mental health counseling for juvenile victim based on expert testimony that the need for, and cost of, the counseling is ascertainable at the time of sentencing; § 3664(d)(5) indicates congressional intent to include post-sentencing harms (but only those not ascertainable at sentencing).

Imposing restitution on multiple defendants

Harmonizing:

“If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.” 18 U.S.C. § 3664(h)

and

“In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.” 18 U.S.C. § 3664(f)(1)(A)

U.S. v. Neal, 36 F.3d 1190 (1st Cir. 1994) (pre-MVRA): Restitution vacated where record

provided no reason why defendant, convicted only of accessory after the fact, was ordered to pay same restitution as other defendants.

U.S. v. Walton, 217 F.3d 443 (7th Cir. 2000) (post-MVRA): Even with mandatory restitution, so long as the restitution imposed is for the full amount of the victims' losses, the court has discretion to apportion the restitution among several defendants if it wants to; here record indicated court thought it had to impose full restitution on each defendant; court should state why it does not apportion if it chooses not to.

To Set a Schedule or Not to Set a Schedule, That is the Question:

Some circuits interpret "due immediately" literally (U.S. v. Mortimer, 52 F.3d 429 (2nd Cir. 1995) and or rely on an MVRA provision directing courts to set schedules (U.S. v. Coates, 178 F.3d 681 (3rd Cir. 1999); U.S. v. Myers, 198 F.3d 160 (5th Cir. 1999), and require a supervision payment schedule be set at sentencing. But see, U.S. v. Trigg, 119 F.3d 193 (7th Cir. 1997). Some circuits go both ways (Compare, U.S. v. Rea, 169 F.3d 1111 (8th Cir. 1999) (error to not set payment schedule) with U.S. v. Gray, 175 F.3d 617 (8th Cir. 1999) (not prejudicial error until defendant released to supervision, when court can correct error by setting schedule)).

But: if BOP is to be able to collect during incarceration, court can either set a payment schedule for period of incarceration (see U.S. v. Kinlock, 174 F.3d 297 (2nd Cir. 1997), or impose "due immediately" *in addition* to payment schedule (see U.S. v. Dawkins, 202 F.3d 711 (4th Cir. 2000).

Note; anticipated new judgment to specify payment to "begin immediately":

Not prone to literal interpretation;

Allows BOP to collect during incarceration;

May or may be accompanied by supervision payment schedule

"*Due immediately*" to be reserved for immediate, lump sum

E. Restitution Articles

1. *"The MVRA and Other Bases of Expansion of Restitution, Or: "Waiter, There's a Tort in my (Sentencing) Soup!"*, Goodwin, unpublished.

[Analysis of the potential expansion of restitution analysis due to the tort-like implication of some terminology added by the MVRA, and some other recent rationales that can potentially support broad restitution orders.]
2. *"The Imposition of Restitution in Federal Criminal Cases,"* Goodwin, Federal Probation, vol. 62, No. 2, December 1998, pp. 95-108.

[Original description of the "5-step" analysis of determining victims and harms for imposing restitution]
3. *"Imposition and Enforcement of Restitution,"* Goodwin, Federal Probation, vol. 64, No. 1, June 2000, pp. 62-72.

[Legal issues on imposing and enforcing restitution, including the determination of assets for payment and enforcement of restitution orders]
4. *"The Perplexing Problem with Criminal Monetary Penalties in Federal Courts,"* Furgeson, Goodwin, and Zucker, Review of Litigation, Vol. 19, No. 2, spring 2000, pp. 167-191.

[Focus on the legal issues and practical problems involved with the manner of imposition of restitution, i.e. whether it is ordered as "due" beginning immediately, or only pursuant to a payment schedule for supervision.]